As I understand the meaning and nature of the Tunney Act statutory process, its principle goal is to ensure that the people who are invariably the principle victims of all antitrust violations, that is to say the general public, have a voice in determining what is and is not in their own best interests. It seems self evident that when deciding how to remedy violations of law which harm the general public, the first principle of guarding the public interest should be to minimize the recurrence of violations by making certain the consequences to the violator always outweigh the rewards. It is unavailing to resolve the case if the violator is allowed to profit from his misdeeds in any fashion, since this only encourages others to show even greater contempt for the law. It is similarly fruitless to go to great expense proving in court the facts of eight such violations and then allow the violator to keep the rewards of them all, and even continue committing one or more. Such seems to be the case in this matter, the United States v. Microsoft, Civil Action No. 98-1232 (CKK).

After carefully reading and researching the findings of fact and conclusions of law of the District Court, as well as the unanimous opinion of the Circuit Court of Appeals, it is apparent that the United States Department of Justice, assisted by the attorneys general of several of the States, made a very compelling and conclusive case to establish that Microsoft Corporation had engaged in an illegal campaign of antitrust violations in order to strengthen and defend their monopoly in PC operating system software. The District Court ruled firmly that Microsoft had committed a large number of violations, and the Court of Appeals unanimously upheld eight of those. In order to analyze the effectiveness of the remedy, the first thing we must do is ensure that Microsoft is not allowed to continue or profit from any of the eight distinct violations identified by the appellate court. I will begin this analysis with a list of the nine violations as they were expressed in X sections of the appeals court's opinion, along with a brief quote of the appeals court opinion regarding each distinct violation (I preserve the heading numbers used by the court, omitting those which were overturned or remanded).

1. Licenses Issued to Original Equipment Manufacturers - "In sum, we hold that with the exception of the one restriction prohibiting automatically launched alternative interfaces, all the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification. The restrictions therefore violate s 2 of the Sherman Act.

2. Integration of IE and Windows - "Accordingly, we hold that Microsoft's exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct, in violation of s 2."

3. Agreements with Internet Access Providers - "Accordingly, we affirm the District Court's decision holding that Microsoft's exclusive contracts with IAPs are exclusionary devices, in violation of s 2 of the Sherman Act."

4. Dealings with Internet Content Providers, Independent Software Vendors, and Apple Computer - "Microsoft having offered no procompetitive justification for its exclusive dealing arrangements with the ISVs, we hold that those arrangements violate s 2 of the Sherman Act." - and - "Accordingly, we hold that the exclusive deal with Apple is exclusionary, in violation of s 2 of the Sherman Act."

5. Java - "Because the cumulative effect of the deals is anticompetitive and because Microsoft has no

procompetitive justification for them, we hold that the provisions in the First Wave Agreements requiring use of Microsoft's JVM as the default are exclusionary, in violation of the Sherman Act." - and - "Therefore we affirm the conclusion that Microsoft's threats to Intel were exclusionary, in violation of s 2 of the Sherman Act." - "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of s 2 of the Sherman Act."

Semantically broken, these quotations uphold nine distinct acts as violations of the Sherman Act:

1. OEM license restrictions which prohibited many actions which might promote Netscape software in Microsoft's dominated market, excepting one which prohibited automatically launching alternative interfaces.

2. Exclusion of Internet Explorer from the Add/Remove Programs utility to force users to accept IE willy-nilly.

3. Commingling of brower and operting system code to further force users to accept IE willy-nilly.

4. Microsoft's exclusive contracts with Internet Access Providers to exlude Netscape from those distribution channels.

5. Microsoft's similar (to #4) dealings with ISV and ICPs to exclude Netscape from still other distribution channels.

6. Microsoft's exclusive dealings with Apple Computer to limit Netscape distribution for MacOS.

7. Microsoft's First Wave Agreements requiring the use of Microsoft's JVM.

8. Microsoft's threatening of Intel, which led to Intel abandoning nascent technologies related to Java which they had already invested considerable effort in researching.

9. Microsoft's campaign to deceive their own customers in order to trick them into writing Microsoft dependent applications when they thought they were writing cross platform Java applications.

After studying the Proposed Final Judgement in this case between the United States and Microsoft, I see that points 3 and 9 are completely unaddressed, and indeed in case 3 Microsoft is being given tacit government approval to continue and extend the practice of commingling operating system code with the code of any application they wish to dominate. Indeed Microsoft has already done this to some measure in their latest operating system release, Windows XP. They are not only continuing to commingle browser and operating system to make IE inextricable from Windows, but are extending the practice to now encompass code previously associated with multimedia authoring and editing. How does the Department of Justice explain this apparent endorsement of a practice ruled illegal by a United States Court of Appeals?

As for the other 7 violations, they are only imperfectly addressed. Virtually every restriction is laden with elaborate and ofttimes contradictory exceptions. Overriding all of these is the stipulation that Microsoft

has sole authority to define what is and is not the operating system. This is carte blanche for Microsoft to continue their illegal practice of extinguishing nascent technologies through "integration". This settlement is going to require constant referral back to the court to re-explain matters which were already clearly stated by the Court of Appeals.

In short, this agreement encourages Microsoft to continue and expand on their illegal practices and encourages others in like circumstances to do the same. It is totally contrary to the public interest, in my opinion.

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